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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 906

GEORGE LANG,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to Petition for a Writ of Certiorari to the Court of Criminal Appeals of Tennessee

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OPINION BELOW

The opinion of the Court of Criminal Appeals of Tennessee was entered and filed on March 23, 1970, and is reported as **Lang v. State**, 457 S. W. 2d 882 (Tenn. Crim. App. 1970). A correct copy of this opinion was attached as part of the appendix to the petition in this case.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. Const., amend. I.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U. S. Const., amend. IV.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable causes, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U. S. Const., amend. VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

U. S. Const., amend. XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

The Respondent is dissatisfied with the Petitioner's presentation of the questions involved, and, therefore, pursuant to **Rule 60(3)** of the **Supreme Court Rules**, presents the questions as follows:

(1) Whether the Petitioner was denied his Sixth Amendment right to a trial by an impartial jury when the jury which tried the Petitioner included jurors who had knowledge of the Petitioner's reputation and who had been previously exposed to some adverse publicity regarding the Petitioner, but who had formed no individual opinions with respect to the guilt or innocence of the Petitioner and who had expressed no doubts as to whether they could fairly try the case.

(2) Whether the Petitioner was denied his Sixth Amendment right to a trial by an impartial jury by the refusal of the trial judge to grant the Petitioner's motion for a change of venue, which motion was grounded in contentions of prejudicial pretrial publicity in and around Madison County, Tennessee, shortly before the Petitioner's trial, and by the refusal of the trial judge to allow the Petitioner's counsel to conduct his voir dire examination of prospective jurors separately and out of the presence of each other for the purpose of examining the prospective jurors on matters relating to their exposure to pretrial publicity, notoriety and talk concerning the Petitioner.

(3) Whether the constitutional rights of the Petitioner under the First, Fourth, and Fourteenth Amendments were violated by the issuance of a search warrant for the Petitioner's residence upon affidavit of a police officer made upon information that the Petitioner had shown obscene booklets to two young adolescent girls, and by a search of the Petitioner's residence conducted pursuant to the warrant and seizure therefrom of obscene booklets without a prior adversary hearing on the issue of the obscenity of the materials.

(4) Whether the constitutional rights of the Petitioner under the First, Fourth, and Fourteenth Amendments were violated by a search of the Petitioner's residence pursuant to a search warrant which described the materials to be searched for and seized as obscene still pictures and books and which further described the materials as indecent, lewd, and used for the offense of contributing to the delinquency of a minor.

(5) Whether the Petitioner was denied his Fourteenth Amendment right to due process of law in his trial upon charges of contributing to the delinquency of two children under eighteen years of age by showing them certain lewd and obscene booklets by the action of the trial judge in allowing the State to ask the Petitioner on cross-examination whether he had a number of nude pictures displayed in his home and whether he had been previously convicted of contributing to the delinquency of a minor when these questions related to the testimony offered by the Petitioner on direct examination by defense counsel.

STATEMENT OF THE CASE

The Petitioner, George Lang, was indicted by the Grand Jury of Madison County, Tennessee, on September 4, 1968, for contributing to the deliquency of two chil-

dren by showing them certain lewd and obscene booklets in violation of Section 37-270, Tennessee Code Annotated.

On September 9, 1968, the Petitioner moved for a change of venue on the grounds of alleged pervasive, prejudicial pre-trial publicity given his case by the news media. At the hearing it was established that the Petitioner's case had received some publicity, through both the written and broadcast media, particularly with respect to the search of the Petitioner's home, the seizure of allegedly obscene materials therein, and the preliminary aspects of the Petitioner's case. Witnesses for both the written and broadcast media testified that they had covered the Petitioner's case in stories prepared for their respective media. They testified in the main that the publicity was not excessive for a criminal case although there was a substantial amount of talk about the case in the community. The Petitioner's motion for a change of venue was overruled.

On September 30, 1968, the Petitioner was tried in the Circuit Court of Madison County, Tennessee, before the Honorable Andrew T. Taylor, Judge, and a jury. The Petitioner entered a not guilty plea. On the voir dire examination of the prospective jurors, it developed that all of the jurors ultimately selected had heard of the Petitioner and had learned about some matters involving the Petitioner through the news media. All had stated, however, that they had not formed opinions as to the guilt or innocence of the Petitioner and could give him a fair trial. Those prospective jurors who had formed opinions were challenged for cause.

The evidence adduced at the trial established that three girls—Lynn Montgomery, aged 9; Ann Charlotte Diffee, aged 10; and Linda Kay Looney, aged 11—were visiting the Petitioner's young daughter—Sandra Lang—at the Petitioner's residence at 12 Cherry Place, Jackson, Ten-

nessee. At about 11:30 to 12:00 that day, the young girls were in the Petitioner's office which adjoins the house. The Petitioner offered to show the girls some dirty books if they would promise not to tell anyone. The Petitioner then showed the girls two or three comic booklets, each entitled, "The Adventures of the Fuller Brush Man," and each graphically depicting various acts of sexual intercourse. Lynn Montgomery testified that the Petitioner asked Linda Looney about her menstrual period and also used words she, Lynn Montgomery, was unfamiliar with, including one beginning with the letter "f" and also the term "sexual intercourse." The Petitioner obtained the books from the top right-hand drawer in his desk.

About a week later Lynn Montgomery told Ann Diffee's fourteen-year-old brother about the incident. Later the parents heard about it and questioned the girls who related the truth to them. A complaint warrant was obtained against the Petitioner. On the basis of an affidavit of Lt. Roy Morgan of the Jackson Police Department, a search warrant was issued by Chancellor McLemore for the search of the Petitioner's home at 12 Cherry Place in Jackson, Tennessee, for the search and seizure of obscene materials, to wit: still pictures and books. An original and two copies of the warrant were made. One copy was left with the Chancellor, and the police then went to 12 Cherry Place with the original and the other copy. The Petitioner arrived about five minutes after the police who had been waiting for him before commencing the search, and the search warrant was served on him. A copy of the warrant was left with the Petitioner, and a search was then commenced. The first area searched was the top right-hand drawer of the Petitioner's desk. A packet of ten obscene booklets bound with a rubber band was found therein. The search continued, and additional obscene materials were found, including comic booklets,

sex books, and photo albums. At the conclusion of the search, the original search warrant was returned to the Chancellor and the copy which was left with him was placed in the police files. Some of the booklets found in the drawer of the Petitioner's desk were later identified by the girls as the booklets shown them by the Petitioner. Only the booklets found in the desk drawer were introduced into evidence.

The Petitioner took the witness stand and testified in his own behalf. He denied showing obscene booklets to the girls, denied asking Linda Kay Looney about her menstrual period, and denied using an obscene word beginning with the letter "f." Although admitting that the obscene booklets were found in his desk drawer, the Petitioner said that he had forgotten that he had put them there three years ago when given them by a salesman. The Petitioner theorized that the girls had found the booklets while looking through the drawers of his desk, and had looked at two or three of them. To avoid punishment when confronted with this, the girls said that he, the Petitioner, showed them the booklets. The Petitioner had found one of the girls looking through his secretary's desk on a prior occasion. He stated that he had frequent trouble with children coming onto his property because of the unusual nature of his house and yard which are attractive to children, that he attempted to prevent children from coming into his house, and that he never showed obscene material to children. The Petitioner admitted on cross-examination that he had a number of paintings in his house, nine of which were of nudes. He further admitted that he had a previous conviction for contributing to the delinquency of a minor, but that the girl involved therein was nearly eighteen years old.

After hearing all the evidence adduced in the case and upon receiving instructions from the trial judge, the jury

deliberated and returned a verdict of guilty and fixed the Petitioner's punishment at a fine of $1,000 and confinement in the county jail for a period of eleven (11) months and twenty nine (29) days. The Petitioner was sentenced in accordance with the jury's verdict and upon the overruling of the Petitioner's motion for a new trial. The Petitioner prayed for, was granted and duly perfected an appeal in error to the Court of Criminal Appeals of Tennessee, assigning numerous alleged errors, including those errors assigned as constitutional errors in the questions presented by his petition. The Court of Criminal Appeals of Tennessee, in an opinion filed on March 23, 1970, affirmed the judgment of the trial court and upheld the Petitioner's conviction. On August 3, 1970, the Supreme Court of Tennessee denied, without written opinion, the Petitioner's Petition for Writ of Certiorari seeking review of the opinion and judgment of the Court of Criminal Appeals of Tennessee entered March 23, 1970.

ARGUMENT

I

The Petitioner Was Not Denied His Sixth Amendment Right to a Trial by an Impartial Jury. The Members of the Jury Which Tried the Petitioner Had Formed No Individual Opinions as to the Petitioner's Guilt or Innocence and Had Expressed No Doubts That They Could Fairly Try the Case.

Respondent submits that the Petitioner was tried before a fair and impartial jury. While the individual jurors all related that they had prior knowledge of the Petitioner, all of the jurors had passed the juror qualification tests of Section 40-2307, Tennessee Code Annotated, which are designed to insure a fair and impartial jury. Those prospective jurors who had formed disqualifying opinions as to the guilt or innocence of the Petitioner or who had expressed doubt as to whether they could fairly try the case were excused for cause. It is well-settled in Tennessee that a juror is not disqualified merely because he has been exposed to some publicity regarding the parties in a case, or even if he has formed an opinion, if that opinion is not fixed or such as would require evidence to overcome. See, e. g., **Warden v. State**, 214 Tenn. 398, 381 S. W. 2d 247 (1964); **Smith v. State**, 205 Tenn. 502, 327 S. W. 2d 308 (1959), **cert. den.** 361 U. S. 930; **Manning v. State**, 155 Tenn. 266, 292 S. W. 451 (1926); **Woods v. State**, 99 Tenn. 182, 41 S. W. 811 (1897). Respondent respectfully submits that the right of the Petitioner to a trial by an impartial jury, as guaranteed by the Sixth Amendment, was fully observed through application of the aforesaid Tennessee tests for juror qualification.

II

The Pretrial Publicity Given the Petitioner's Case by the News Media Was Not of Sufficient Pervasiveness or Intensity as to Cause Inherent Juror Prejudice and Partiality. Thus, the Refusal of the Trial Judge to Grant the Petitioner a Change of Venue and to Permit the Petitioner's Counsel to Conduct His Voir Dire Examination of the Prospective Jurors Separately and Out of the Presence of Each Other Did Not Violate the Petitioner's Rights Under the Sixth and Fourteenth Amendments.

Respondent submits that although certain aspects of the Petitioner's case had been covered by the news media through news stories disseminated through the written and broadcast media, the coverage given was neither pervasive nor intense. While the area covered by the effective range of the media involved was relatively large, the news stories themselves were not lengthy, were not given particular prominence or emphasis, and evidenced little editorialization.

In an era of rapid communication through diverse media, it is difficult to insulate prospective jurors from the circumstances attending criminal cases when news media exercise their legitimate prerogative of reporting news incidents as they occur. This function of the news media was recognized by this Honorable Court in **Irvin v. Dowd**, 366 U. S. 717 (1961):

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly

> true in criminal cases. To hold that the mere existence of any preconceived notion as to guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." 366 U. S. at 722-723.

It is only where pretrial publicity has so pervaded the community as to make juror prejudice inherent as a matter of law that fundamental fairness precludes a trial before a jury drawn from the same community. **Rideau v. Louisiana**, 373 U. S. 723 (1963).

The **Rideau** case provides an example of prejudicial pretrial publicity causing inherent juror prejudice as a matter of law. There the defendant was apprehended in connection with a bank robbery which also involved a kidnapping and a murder. A sound film of the defendant's interrogation by the sheriff, wherein the defendant admitted his participation in the crimes, was broadcast over television three different times to an estimated audience of 97,000 persons in a community of 150,000. The Court in **Rideau** said:

> ". . . we hold that it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed **repeatedly and in depth** to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged." (Emphasis supplied.) 373 U. S. at 726.

Respondent respectfully contends that the pretrial publicity given the Petitioner by the news media fell far short of that given the defendant in **Rideau v. Louisiana**,

373 U. S. 723 (1963). While the dissemination of the Petitioner's coverage was such as to reach a relatively large number of people, the substance of the news material did not reach "in depth" proportions nor was such prominence given the news material as to attract more than incidental attention.

For these reasons, the Respondent respectfully submits that the protection of the Petitioner's constitutional rights under the Sixth and Fourteenth Amendments did not require that the trial judge grant a change of venue or permit the Petitioner's counsel separately to question prospective jurors on voir dire examination regarding their exposure to the pretrial publicity.

III

The First, Fourth and Fourteenth Amendments Do Not Require the Holding of an Adversary Hearing to Determine Whether Materials Are Obscene Before a Search Warrant Is Issued for Such Materials Where There Is Probable Cause to Believe That the Materials Were Used as Instrumentalities in the Criminal Offense of Contributing to the Delinquency of Minor Children.

At the outset, Respondent recognizes the holdings of this Honorable Court in **A Quantity of Books v. Kansas**, 378 U. S. 205 (1964), and **Marcus v. Search Warrants of Property**, 367 U. S. 717 (1961), which applied First Amendment protections to the seizure of obscene materials. These cases involved seizures of materials for the purpose of suppression and removal from circulation. Due to the constitutional protections of the First Amendment, it was held in **Books** and **Marcus** that before allegedly obscene material is searched for and seized by state authorities, an adversary proceeding on the issue of obscenity is required by the due process provisions of the

Fourteenth Amendment. These decisions found state statutes constitutionally insufficient which failed adequately to safeguard the First Amendment protection given to nonobscene material. Sections 39-3003 and 39-3005, Tennessee Code Annotated, represent a codification of the principles enunciated in the **Books** and **Marcus** holdings. It is the position of the Petitioner that the procedures outlined in Sections 39-3003 and 39-3005, Tennessee Code Annotated, must be followed before any search warrant issued for obscene materials can be legally valid.

Respondent respectfully submits that the Court of Criminal Appeals of Tennessee was correct in holding that the decisions in **A Quantity of Books v. Kansas**, 378 U. S. 205 (1964), and **Marcus v. Search Warrants of Property**, 367 U. S. 717 (1961), and the procedures contained in Sections 39-3003 and 39-3005, Tennessee Code Annotated, were not applicable to the issuance of the search warrant for the Petitioner's residence. The search in the instant case was not an action by a state agency to suppress or remove from circulation "obscene" materials, nor did it involve the Petitioner's right to possess such materials under **Stanley v. Georgia**, 394 U. S. 557 (1969). Rather, the question was whether the showing of the materials to young, adolescent girls constituted an act of contributing to the delinquency of a child in violation of Section 37-270, Tennessee Code Annotated. Thus, the materials in question, even if not legally obscene, were the proper subjects of a search warrant if probable cause were shown that the materials were used in a manner to contribute to the delinquency of children. In this respect Respondent respectfully contends that the booklets seized pursuant to a search of the Petitioner's residence are in no wise different from instrumentalities used in the commission of other crimes. Accordingly, Respondent respectfully submits that the issuance of a search warrant by a magistrate

based on a showing of probable cause supported by affidavit were the proper procedures to be followed in the instant case and in no way violated the Petitioner's rights under the First, Fourth or Fourteenth Amendments.

IV

The Subject Matter of the Search Warrant for the Petitioner's Residence Was Described With Sufficient Particularity to Meet the Requirements of the Fourth Amendment.

The search warrant issued for the Petitioner's residence described the material to be searched for as "obscene materials . . . to wit: still pictures and books." The materials were further described as "indecent," "lewd," and "being used for the offense of contributing to the delinquency of a minor." The Petitioner contends that this description was too vague, leaving much to the individual discretion of the searching officer. As indicative of the vagueness of the description, the Petitioner points to the scope of the search which resulted in the seizure of a substantial quantity of allegedly obscene materials in violation of his rights under the First Amendment. **Stanley v. Georgia**, 394 U. S. 557 (1969).

Respondent respectfully submits that the description in the search warrant should not be tested by the degree of particularity required when obscene material is seized for suppressive purposes, **Marcus v. Search Warrants of Property**, 367 U. S. 717 (1961), but rather by the degree of particularity required to enable an officer executing the warrant to identify the property with reasonable certainty from the face of the warrant without other information. Such a test meets the requirements of the State of Tennessee regarding descriptions in search warrants, **Bowling v. State**, 219 Tenn. 224, 408 S. W. 2d 660 (1966), and

comports with the specificity requirements of the Fourth Amendment.

Respondent observes that the searching officer had little difficulty in locating the booklets which were shown to the young girls. The booklets were found immediately in a drawer of the Petitioner's desk. There can be little doubt that the booklets contained still pictures which were obscene, indecent, and lewd. Moreover, such a description was deduced from the information received from the young, adolescent girls who were the victims of the crime and who would likely be unable to provide a more detailed description of the materials shown to them by the Petitioner. Thus, Respondent respectfully submits that not only was the subject matter of the search warrant described with sufficient particularity to meet the requirements of the Fourth Amendment, but also was the most particular description available under the circumstances, considering the age and immaturity of the girls who provided the information on the materials.

V

The Petitioner's Right to Due Process of Law Under the Fourteenth Amendment Was Not Violated by the Discretionary Refusal of the Trial Judge to Curtail the Cross-Examination of the Petitioner When the Questions Asked by the State Related to the Direct Testimony of the Petitioner.

In Tennessee, wide latitude is given to the scope of cross-examination, which is largely a matter within the discretion of the trial judge. Absent an evident abuse of discretion, which would constitute a denial of due process, an appellate court will not interfere with the exercise of that discretion. *E. g.*, **State v. Fowler**, 213 Tenn. 239, 373 S. W. 2d 460 (1962); **Davis v. Wicker**, 206 Tenn. 403, 333 S. W. 2d 921 (1960).

Respondent respectfully submits that the Court of Criminal Appeals of Tennessee was correct in sustaining the action of the trial judge in permitting the State to ask the Petitioner on cross-examination whether he had nude pictures displayed in his home and whether he had been previously convicted of contributing to the delinquency of a minor. No abuse of discretion by the trial judge was revealed in the record.

With respect to the question regarding the nude pictures displayed in the Petitioner's home, Respondent contends that this testimony bore a relationship to the testimony given by the Petitioner on direct examination. Specifically, the Petitioner asserted in his direct testimony that his unusual house and yard were attractive to children; that he attempted to keep children out of his house; and that he never showed obscene material to children. By comparison, one of the young victims testified that on a prior occasion she had been all the way through the Petitioner's house, including the bedrooms. Thus, the nude painting testimony tended to contradict the Petitioner's prior testimony regarding his implied efforts to insulate neighborhood children from potentially improper materials.

With respect to the question concerning a prior conviction for the crime of contributing to the delinquency of a minor, Respondent contends that this testimony also related to the Petitioner's direct testimony wherein he stated that he never did anything to corrupt the victims or any other children. The fact that he did contribute to the delinquency of a minor before tended to impeach the Petitioner's credibility.

Thus, Respondent respectfully submits that the Petitioner's right to due process of law was not violated in any manner during his cross-examination by the State.

CONCLUSION

Respondent submits that in the instant case the Petitioner has failed to show that his federal constitutional rights under the First, Fourth, Sixth and Fourteenth Amendments were in any wise violated or that the questions herein involved are substantial or of broad national concern. Rather, Respondent submits that the Petitioner received a fair and impartial trial wherein his constitutional rights were observed.

As the petition presents no question which merits this Honorable Court's review upon a writ of certiorari, Respondent respectfully submits that this petition for a writ of certiorari should be denied.

Respectfully submitted

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